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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 88

IRENE BARTSCH,

Petitioner,

v.

METRO-GOLDWYN-MAYER, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Questions Presented

The Petition for Certiorari (2)* attempts to present three questions which are intended by the petitioner to circumvent the fact that a narrow, private and particular contract controversy has been resolved by the United States District Court for the Southern District of New York, with unanimous affirmance by the United States Court of Appeals for the Second Circuit, on grounds just and reasonable with no resulting conflict of decisions.

The memorandum opinion of Judge Frederick vP. Bryan (3a-16a), upon consideration of all of the testimony and

* All page references are to the Petition for Writ of Certiorari and Appendix unless otherwise stated.

exhibits admitted into evidence sets forth at least three basic grounds for finding that the respondent had validly and expressly obtained the right to license the motion picture "MAYTIME" for exhibition through the medium of television:

1. ". . . exhibition of the film on television is simply another way of projecting, transmitting and reproducing the play within the contemplation of the 1930 grant" (10a);

2. ". . . The exhibitions of the film on television qualify as reproductions of the play 'by the art of cinematography or any process analogous thereto'" (10a);

3. ". . . Bartsch transferred to Warner nothing less nor more (i.e. everything) he had received from the prior owner . . . There was nothing for him to retain. He thus could not have retained the television rights" (13a-14a).

A fair reading of the Court of Appeals opinion herein (31a-41a) clearly establishes that while the Court of Appeals did not find it necessary to adopt Judge Bryan's reasoning *in toto*, a grant of "'the motion picture rights throughout the world,' which were spelled out to include the right 'to copyright, vend, license and exhibit such motion picture photoplays throughout the world' . . . includes the right to 'license' a broadcaster to 'exhibit' the copyrighted motion picture by a telecast without a further grant by the copyright owner" (36a-37a).

Respondent urges that certiorari be denied absent a clear showing that the Court of Appeals holding was erroneous in denying petitioner recovery or that the holding is in conflict with this Court or another court of appeals.

Statement of the Case

Petitioner's Statement of the Case (3-9) insofar as it follows the language and reasoning of the opinions of the trial court (3a-16a) and the Court of Appeals (31a-41a) is basically correct; however, the emphasis and the inferences drawn therefrom are entirely misleading (3-4).

Respondent, perhaps, could have raised the issue of whether the grant in issue was broad enough to grant "television rights" in general; instead, it chose not to claim "live television rights" or in fact any rights other than the right to exhibit its motion picture on television. To paraphrase the argument contained in the first full paragraph of petitioner's Statement (3-4) within the language of the Court of Appeals affirming opinion, petitioner would be correct in characterizing the contract determination of the Court of Appeals as affecting two important rights under copyright in a manner entirely consistent with the language of the grant in issue and existing case law; viz., (i) the motion picture rights granted under the narrow, private and particular Bartsch/Warner contract included the right to license the motion picture "MAYTIME" for exhibition on television and (ii) the granted right "to copyright, vend, license and exhibit" a motion picture photoplay (without limitation) included the right to "license" a broadcaster to "exhibit" the copyrighted motion picture by a telecast without a further grant from the copyright owner of any underlying work.

Petitioner is still grasping for support in alluding to various other motion picture grants to respondent's predecessor in interest, *circa* 1930, despite Judge Bryan's proper ignoring of these irrelevant grants (9a); similar treatment by the Court of Appeals on this point is clear indication of the lack of merit of petitioner's contention (39a-40a).

Reasons for Denying the Writ

I. The narrow, private and particular contract controversy here presented has been resolved by unanimous affirmance on grounds just and reasonable.

The rights claimed by respondent derive only from the May 12, 1930 Bartsch/Warner grant (Exhibit B, 21a-30a), the ultimate source. This poses a question of contract construction to ascertain the intent of the parties as to the scope of the transfer. The determination of such a contractual question between private parties on special facts as to the rights acquired under a particular contract presents no issue of public interest or importance for the purpose of review by this Court. This is especially so when the District Court decision dismissing the complaint has received, following a well-reasoned opinion, the unanimous affirmance of the Court of Appeals. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275 (1949).

Moreover, a consideration of the facts coupled with a reading of both opinions demonstrates that the decision is not only reasonable, but undoubtedly just and correct in resolving the contractual question in this case. In arriving at the conclusion that respondent at the very least validly obtained the rights to "copyright, vend, license and exhibit such motion picture photoplays throughout the world" which included the rights to "license" a broadcaster to "exhibit" the copyrighted motion picture by a telecast, the Court of Appeals correctly held that the words of the grant "were well designed to give the assignee the broadest rights with respect to *its* copyrighted property" (38a). Petitioner is now faced with the added impost of asking this Court to disregard its repeated

pronouncements that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error". *Graver Tank & Mfg. Co.* v. *Linde Air Products Co., supra; Berenyi* v. *Immigration and Naturalization Service,* 385 U. S. 630 (1967).

Indigenous to both of the opinions below are *facts* and *inferences* drawn therefrom to the effect that respondent has contractually acquired the rights to license its motion picture photoplays for exhibition on television. These facts and inferences clearly bring this case within the "clearly erroneous" standards of Rule 52a of the Federal Rules of Civil Procedure.

The "clearly erroneous" rule applies to inferences drawn from undisputed facts as well as to findings of fact on disputed evidence. *C.I.R.* v. *Duberstein,* 363 U. S. 276 (1960); *Swan* v. *C.I.R.,* 355 F. 2d 795(6th Cir. 1966); *A.L.B. Theatre Corp.* v. *Loew's Inc.,* 355 F. 2d 495 (7th Cir. 1966); *Weddle* v. *C.I.R.,* 325 F. 2d 849 (2d Cir. 1963).

Despite the fact that petitioner's claim is for copyright infringement, both opinions indicate that the only issue was interpretation of a contract. The contract field is one in which the application of the "clearly erroneous" doctrine is most prevalent. *Boswell* v. *Chapel,* 298 F. 2d 502 (10th Cir. 1961); *Western Surety Co.* v. *Redman Rice Mills, Inc.,* 271 F. 2d 885 (8th Cir. 1959); *Menkoff* v. *A. D. Juilliard & Co.,* 182 F. 2d 236 (1st Cir. 1950). In *Menkoff* the Court of Appeals ruled that a trial judge's determination that a plaintiff's version of a contract was correct came under the purview of Rule 52a, *supra.* So too, the holdings that respondent's interpretation of the May 12, 1930 grant is correct is a finding of fact and cannot be reversed unless petitioner bears the burden of proving that both holdings were "clearly erroneous".

II. The May 12, 1930 Bartsch/Warner grant (Exhibit B) included the right to license for television exhibition a motion picture produced pursuant to said grant.

A. The right to exhibit the motion picture "Maytime" by means of television was expressly included in the Bartsch/Warner agreement of 1930.

On or about May 12, 1930 petitioner's predecessor in rights, Hans Bartsch, granted to Warner, respondent's predecessor in rights, exclusive and absolute motion picture rights (Exhibit B, 21a-30a), which grant includes the following:

> "* * * the motion picture rights throughout the world, in and to a certain musical play entitled 'Wie Einst Im Mai' * * * for the full period of all copyrights and any renewed and extended terms thereof, together with the sole and exclusive right to use, adapt, translate, add to, subtract from, interpolate in and change said musical play, and the title thereof * * * in the making of motion picture photoplays and to *project, transmit and otherwise reproduce the said musical play or any adaption or version thereof visually and audibly by the art of cinematography or any process analogous thereto,* and to copyright, vend, *license and exhibit* such motion picture photoplays throughout the world * * *
>
> "* * * but it is expressly understood and agreed that nothing herein contained shall in any way limit or restrict the *absolute right* of Purchaser to produce, release, distribute and/or exhibit the photoplay or photoplays produced hereunder based in whole or in part on 'Wie Einst Im Mai' and/or 'Maytime', in all countries of the world, including the territories mentioned in this paragraph, at any time, and *regardless* of the right herein reserved to the owner * * *

"* * * the rights which the Purchaser obtains from the Owner in 'Wie Einst Im Mai' and/or 'Maytime' are specifically limited to those granted herein. All other rights now in existence or which may hereafter come into existence shall always be reserved to the Owner and for his sole benefit, but *nothing herein contained shall in any way limit or restrict the rights which Purchaser has acquired or shall hereafter acquire from any other person, firm or corporation in and* to 'Wie Einst Im Mai' and/or 'Maytime' * * *" (Italics supplied)

At the outset, it is important to distinguish between television and motion picture rights in any given literary property and to clearly understand just what rights respondent claims by virtue of the May 12, 1930 assignment from Hans Bartsch to Warner.

As the term is generally understood, television rights contemplate the immediate transmission of a "live" production, that is, while it is actually being performed. To be distinguished from this are motion picture rights which involve the production of a motion picture and its subsequent exhibition. Respondent contends that the Trial Record, reason and the weight of authority dictate that the right to exhibit its motion picture on television was included in the unrestricted assignment of "motion picture rights".

Even a cursory reading of the granting language supports respondent's contention that it was granted all rights in connection with the production and exhibition of the film it was to make. Though the word "television" was not specifically mentioned, the use of the words "transmit" and "any process analogous thereto" (cinematography) is strong evidence that the parties contemplated the broadest possible grant of exhibition rights and that these exhibition rights included not only television but also any

other means that might later be developed, e.g., laser beams.

The word "television" could well have been forsaken in favor of broader language so as not to risk invoking the rule *expressio unius est exclusio alterius* (39a). Cf. *Warner Bros. Pictures* v. *Columbia Broadcasting System, Inc.*, 102 F. Supp. 141 (S. D. Calif. 1951), aff'd 216 F. 2d 945, 949 (9th Cir. 1954), cert. den. 348 U. S. 971 (1955).

Petitioner introduced various grants contemporaneous with Exhibit B in which the word television was actually used and apparently attached great significance to the fact that this word was omitted in the instant grant.

Such grants are not at all relevant to an interpretation of the language in question. Petitioner and respondent both readily admit a general knowledge of the advent of television in 1930. Beyond this these other documents have no probative value and in similar situations have been systematically rejected by the courts of this state when offered to define terms used in another agreement. See, e.g., *Catalano* v. *J. C. MacElroy Co., Inc.*, 13 A. D. 2d 914 (1st Dep't 1961); *McLoghlin* v. *National Mohawk Valley Bank*, 139 N. Y. 514, 522 (1893) (9a).

Looking further at the granting language of Exhibit B, it is readily apparent that it is couched in broad and generic terms. The fact that the right to exhibit or license the film for exhibition on television was encompassed thereby may be seen from the terminology by which the totality of motion picture rights, including unlimited and unrestricted means of exhibition, was conveyed. For purposes of greater clarity the component clauses of this paragraph will be analyzed.

1. "Owner hereby grants and assigns * * * the motion picture rights throughout the world * * * together with the sole and exclusive right to use (etc.) * * *."

Short of inventing new terms, it is impossible to see how the draftsmen could have better expressed the intent of the parties that everything conceivably comprehended by the term "motion picture rights" passed to the grantee. No residium of motion picture rights of any sort remained in the grantor after the conveyance of these rights. The adjectives "sole" and "exclusive" signify that nothing less than the whole bundle of motion picture rights was to belong to the grantee exclusively as against the world, including the grantor.

> 2. "To project, transmit and otherwise reproduce (the photoplay) visually and audibly by the art of cinematography or any process analogous thereto, and to copyright, vend, license and exhibit such motion picture photoplays throughout the world * * *"

No limitation as to the media of use appears. It is a familiar rule of construction that every word of an agreement is presumed to have some purpose [*First Nat'l Bank* v. *Jones,* 219 N. Y. 312 (1916)] and that effect must be given to every part if reasonably possible. *Sattler* v. *Hallock,* 160 N. Y. 291 (1899). As part of the granted rights, the grantee was given the right to "transmit" or "otherwise reproduce" motion picture versions of "WIE EINST IM MAI" without limitation.

It is commonly known that the televising of a motion picture involves the use of a transmitter to send out signals which are received in the home by a "receiver" (television set) which electro-magnetically reconstitutes the signal emanating from the transmitter into a picture accompanied by sound. That meaning of the word "transmit" was known in or about 1930 as well, for the 1931 edition of *Funk & Wagnalls' New Standard Dictionary* defines television as "the instantaneous transmission to a distance of images, views, or objects by telegraphy either with wires or without".

Granting to Warner the right to copyright its motion picture, without limiting the use of the copyright in the film in any manner, demonstrates that the seller parted with unrestricted control over any use to which the film might be put. A motion picture photoplay may be copyrighted under Section 5(1) of the Copyright Law [17 U.S.C. 5(1)]; and once copyrighted, it is entitled to the protection which Section 1(d) of the Copyright Law affords to a "dramatic work". *Metro-Goldwyn-Mayer Distributing Corp.* v. *Bijou Theatre Co.*, 59 F. 2d 70 (1st Cir. 1932). As in the case of practically every feature motion picture, the motion picture here involved was copyrighted.

The existence of a copyright in respect to "Wie Einst Im Mai" did not preclude the acquisition by the grantee under the instant contract of a copyright in and to its motion picture as a "piece of property wholly separate and independent from the novel and drama". *G. Ricordi & Co.* v. *Paramount Pictures*, 92 F. Supp. 537, 540-541 (S.D.N.Y. 1950); *Photo-Drama Motion Picture Co., Inc.* v. *Social Uplift Film Corp.*, 220 Fed. 448, 450 (2d Cir. 1915); Ball, *Law of Copyright and Literary Property*, p. 537.

The owner of a copyrighted motion picture acquires the right to "exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever". 17 U.S.C.A., sec. 1(d). These incidents of ownership of a copyrighted motion picture include the right to grant exclusive or restrictive licenses to others to exhibit said motion picture. *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 227-228 (1937).

Under the instant contract the grantee "acquired a full ownership in the picture, subject only to the limitations contained in the contract. This ownership included the right to use the picture publicly in any form of exhibition, except as such right is limited by the terms of the contract". *Lillie* v. *Warner Bros. Pictures, Inc.*, 139 Cal. App. 724, 728. As has been shown, the contract did not limit the use of the motion picture to any particular form of

exhibition. The grant of unrestricted copyright to the purchaser in respect to its motion picture militates against the construction contended by petitioner.

The grant demonstrates that Warner's rights as concerns "licensing" and "exhibition" are not limited to any medium of exhibition. The granting paragraph and in fact, the "reservation" paragraph (paragraph 13) can be searched in vain for the use of any words importing any limitation as to the exclusive right to license and exhibit the motion picture film produced pursuant to the grant in question (38a).

There has not been much litigation concerning whether or not a grant of "motion picture rights" includes the right to exhibit the film on television. The only case directly in point is *Wexley* v. *KTTV, Inc., et al.*, 108 F. Supp. 558 (S. D. Calif. 1952), aff'd 220 F. 2d 438 (9th Cir. 1955). The *Wexley* case concerned an agreement wherein the author and copyright owner of a play assigned the motion picture rights to defendants' assignors and subsequently sued for infringement when the motion picture produced thereunder was telecast. The Court stated that the sole issue was whether the assignment transferred to the purchaser the right to televise a motion picture produced under the assignment provisions. The District Court said at pp. 559-560:

> "It will be observed that the owners grant '• • • the sole and exclusive right throughout the world to make • • • exhibit, • • • motion picture versions of the said dramatic composition • • • in any manner and method now or any time hereafter ever known or made available • • •.' Television, being a presently known method of exhibiting motion pictures, the right to televise motion pictures is granted unless a limitation or reservation is expressly and clearly imposed.
>
> • • •

"* * * because such a reservation would conflict with the right granted the purchaser to exhibit motion pictures in 'any manner or method now or any time hereafter ever known or made available'."

There can be no question here but that Warner validly obtained the exclusive and absolute right to exhibit the motion picture "MAYTIME". Nowhere in the grant in question is there any implied restriction, limitation or reservation as to the method, means or medium by which respondent could distribute or exhibit its motion picture, *much less an expressly and clearly imposed limitation or reservation. Contra,* the reservation clause merely reserves the rights not granted (27a), but no reservation could *in any way limit or restrict the rights which purchaser has acquired,* i.e.; the *absolute right* to distribute and/or exhibit, *regardless* of any reserved rights.

There is no contention here that respondent wrongfully produced the motion picture "MAYTIME". There would be no complaint from petitioner if respondent chose to exhibit its film by projecting it in any motion picture theatre, airplane, or other place where the audience would view a projection upon a screen with the aid of light rays, images recorded upon a film with such rapid and changing succession of exposures as to give the optical effect of a continuous picture of the object even when in motion. Again, petitioner is merely protesting the specific licensing by respondent of the motion picture film "MAYTIME" for exhibition via television.

A very interesting case in point is the case of *Philadelphia Retail Liquor Dealers Association* v. *Pennsylvania Liquor Control Board,* 360 Pa. 269, 62 A. 2d 53 (1948), wherein the Court construed a 1933 statute expressly covering regulation of "moving picture exhibitions" to include the use of television devices in general. In expressly characterizing the showing of motion picture film on tele-

vision, the Court said at pages 274-275:

> "The learned court below found and it is not disputed that television is used to broadcast moving picture exhibitions. In that connection, an expert witness called by the plaintiff admitted that when a motion picture is shown on a television set, the same picture there appears as would be seen on the screen where the televised motion picture is being broadcast. In that situation, such entertainment could not fairly be characterized as other than a moving picture exhibition and, therefore, directly subject to the Board's regulation and control by the express words of the Act."

Based on the above, it is the contention of respondent that the unambiguous, exclusive and absolute right to distribute and/or exhibit its motion picture film clearly enabled respondent to freely license its film for television exhibition.

B. The right to exhibit the motion picture "Maytime" by means of television was impliedly included in the Bartsch/Warner agreement.

Assuming *arguendo* that the granting language in the Bartsch/Warner agreement cannot be construed as expressly giving Warner and its successor the right to license its film for television exhibition, respondent contends that the granting language must at least impliedly grant all television rights, and certainly the right to exhibit the motion picture film "MAYTIME" on television.

The mere fact that respondent contends that the granting rights are broad enough to include the exhibition of a motion picture film on television, and petitioner insists that such is not the case, leads to the inescapable conclusion that the grant in question contains "ambiguous" phraseology. The word "ambiguous" means "capable of being understood in either of two or more possible senses".

Webster's New International Dictionary, 81 (2d Ed. 1957). Even though television was experimentally known in 1930, it was not commercially developed until much later. Ambiguity suggests that there was an absence of intent rather than a hidden intent.

In *Nimmer On Copyright* (1963), Professor Nimmer, in dealing with the problem of whether a grant of motion picture rights includes the right to exhibit the film on television, writes as follows at pages 545-546:

> "The other alternative, and the one which it is believed is to be preferred, is to hold that the licensee may properly pursue any uses which may reasonably be said to fall within the medium as described in the license. This would include uses within the ambiguous penumbra since if whether or not a given use falls within the description of the medium is ambiguous it must, by definition mean that it is within the medium in a reasonable sense (albeit this is not the only reasonable sense). 'In other words, the question before the court is not whether he (the licensee) gave the words the right meaning, but whether or not the words authorized the meaning he gives them.'
>
> "This approach commends itself in part because the courts are equipped to determine the outer limits of the reasonable meaning of a term when it may well be impossible to locate a supposed true and single intent of the parties which generally never in fact existed. It further appears preferable to the strict construction alternative first suggested above since it is less likely to prove unjust. Remember that the licensor has consented to the use of a term (e.g., motion picture rights) which under one, though not the only, reasonable meaning includes the ambiguous penumbra (e.g., exhibition of motion picture film on television). It is possible that both the licensor and the licensee at the time of execution intended the term to include this

meaning, or at least would have so intended had they thought about it. It is also possible, of course, that neither party intended nor would have intended such meaning. But in weighing these two alternative possibilities the decisive fact (in the absence of direct evidence of intent) is that both parties agreed to include a term which in its ambiguity was capable of the extended meaning. In such circumstances it is surely more arbitrary and unjust to put the onus on the licensee by holding that he should have obtained a further clarification of a meaning which was already present than it is to hold that the licensor should have negated a meaning which the licensee might then or thereafter rely upon."

Professor Nimmer's reasoning above fits the "MAYTIME" case perfectly, even though respondent obtained more than mere "motion picture rights" (40a-41a).

Evidence as to the special or trade meaning of the words "motion picture rights" is admissible. *Murphy* v. *Warner Bros. Pictures,* 112 F. 2d 746 (9th Cir. 1940), and authorities cited therein. In support of the contention that this term by virtue of custom in the trade includes television exhibition rights is the clear statement to this effect in *Hollywood Plays, Inc.* v. *Columbia Pictures Corp.,* 77 N.Y.S. 2d 568, 574 (1947). "The term 'motion picture rights', by virtue of custom, also embraces television and radio rights. . . ."

Of course, what was custom in 1943 may not have been in 1930. However, it is reasonable to assume that trade usage, if not custom, defined motion picture rights to include television exhibitions. "*Custom* is that length of *usage* which has become law." *Walls* v. *Bailey,* 49 N. Y. 464 (1872).

In many cases, while although not directly on point, the Courts have reached conclusions very similar to the relief sought herein by respondent. Perhaps the most analo-

gous situation concerns the question of whether "motion picture rights" included sound motion picture rights. In the leading case holding that sound motion picture rights were included in the broader term, *L. C. Page & Co.* v. *Fox Film Corp.*, 83 F. 2d 196 (2d Cir. 1936), the Court ruled that "exclusive moving picture rights" included technical improvements in motion pictures developed during the license so as to include talking motion pictures, although unknown at time of execution of agreement, notwithstanding the acknowledgment that at the time of the grant (1923) sound motion pictures were not within the contemplation of the grantor. See also, *M. Rosenberg and S. Lesser* v. *H. B. Wright,* 20 Copyright Decisions 599 (Superior Court for County of Los Angeles, Calif. 1934).

In effect the *Page and Rosenberg* decisions held that sound rights were contained in the "ambiguous penumbra" of moving picture rights, and in so doing defined the phrase "moving picture rights" in a reasonable and proper manner (albeit the phrase was "ambiguous").

Another problem which has been litigated and provides further analogy concerns the right of a motion picture company in the absence of express granting language to license for television exhibition the performance of the performer starring in the motion picture. In *Televising Old Films—Some New Legal Questions About Performers' and Proprietors' Rights* by Herbert T. Silverberg, 38 Virginia Law Review 615, Silverberg states at page 616:

> "The motion picture producers have taken the position that unless limited by contractual provision, they have the unrestricted right as to all films produced by them to use, sell or license others to use them, upon any terms and for any purpose they wish, including television."

The leading case determinative of the above principle is *Republic Pictures Corp.* v. *Rogers,* 213 F. 2d 662 (9th

Cir. 1954), cert. den. 348 U. S. 858. In the *Rogers* case, the motion picture company obtained the right to use the actor's "name, likeness and voice" and to reproduce actor's "acts, poses, plays and appearances." The Court held that the motion picture company was entitled to license use of motion pictures in which actor appeared on television programs. The Court held further that when Rogers divested himself of all rights in and to the movies in which he appeared, the actor could not thereafter claim that his rights were infringed.

In a companion case, *Autry* v. *Republic Productions*, 213 F. 2d 667 (9th Cir. 1954), cert. den. 348 U. S. 858, the Court held that where the actor gave the motion picture producer the right to reproduce any "acts, poses, plays and appearances" of the actor, the producer had the unlimited right to photoplays, including the right to license use thereof for exhibition on television programs.

All of the above cited cases are compatible with the principle that any ambiguity should be construed in favor of the grantee, rather than the grantor. This principle of law has been clearly established in the Federal Courts.

In *Grant* v. *Kellogg Co.*, 58 F. Supp. 48, 51 (S.D.N.Y. 1944), the Court said:

> "If in the transfer there was any limitation for the benefit of the plaintiff, that limitation, restriction or reservation, whatever it may be called, must have been expressed and clearly imposed. Otherwise it will not be presumed. *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, 297, 28 S. Ct. 72, 52 L. Ed. 208, 12 Ann. Cas. 595; *Dielman* v. *White*, C. C., 102 F. 892, 895; *Dam* v. *Kirk La Shelle Co.*, 2 Cir., 175 F. 902-904, 41 L.R.A., N. S. 1002, 20 Ann. Cas. 1173; *Yardley* v. *Houghton Mifflin Co.*, 2 Cir., 108 F. 2d 28, 31, certiorari denied 309 U. S. 686, 60 S. Ct. 891, 84 L. Ed. 1029; *Pushman* v. *New York Graphic Society*, 287 N. Y. 302, 39 N. E. 2d 249."

In contending that the purchaser's rights are limited, petitioner engages in the uniformly condemned practice of trying to reduce or limit the scope of an express grant by reading into it language of limitation not clearly supplied by the instrument. *Grant* v. *Kellogg Co., supra; Macloon* v. *Vitagraph,* 30 F. 2d 634, 636 (2d Cir. 1929); *Vargas* v. *Esquire, Inc.,* 164 F. 2d 522, 526 (7th Cir. 1947); *Pushman* v. *New York Graphic Society,* 287 N. Y. 302 (1942); *Emigrant Ind. Sav. Bank* v. *108 W. 49th St. Corp.,* 8 N.Y.S. 2d 354, 359, 255 App. Div. 570, aff'd 21 N. E. 2d 620, 280 N. Y. 791 (1939).

In *Pushman* v. *New York Graphic Society, supra,* the Court stated at page 308:

> "The Courts cannot read words of limitation into a transfer which the parties do not choose to use."

An implied restriction is one which necessarily arises from the language used by the parties. The situation must be one wherein no other construction is supportable. Far from necessitating such an implication, the claimed restriction at bar would effectually curtail the scope of several of the express grants to the purchaser as well as the incidents of the respondent's ownership of the copyright in its motion picture. This leads to a presumption that no such restriction was intended. *Macloon* v. *Vitagraph, supra; Vargas* v. *Esquire, Inc., supra; Grant* v. *Kellogg Co., supra.*

These rules have peculiar application where the right claimed is resisted on the ground that it was placed in limbo, i.e., that neither side could exercise the right. In the case of *Macloon* v. *Vitagraph, supra,* the rule was thus stated:

> "The law always favors the free and unrestricted use of property, and doubts and ambiguities should be resolved in favor of the natural right to such free use and enjoyment, and against restrictions thereof."

If for some reason the Court had ruled that respondent did not have the right to license for television exhibition the motion picture film "MAYTIME" and that petitioner was *not* at liberty to assign any "television rights", then if petitioner assigned to another or used "television rights", the licensee of television rights under such circumstances would compete unfairly with respondent's motion picture rights and diminish the value of the contract in question. Hence, a negative covenant is implied which precludes petitioner from using even ungranted portions of the copyright to the detriment or destruction of respondent's rights. *Uproar Co.* v. *National Broadcasting Co.*, 8 F. Supp. 358, modified 81 F. 2d 373 (1st Cir. 1936), cert. den. 298 U. S. 670 (1935); *Kirke La Shelle Co.* v. *Armstrong Co.*, 263 N. Y. 79 (1933); *Underhill* v. *Schenck*, 238 N. Y. 7 (1924). Accordingly, respondent contended that the principle of implied negative covenant rested upon the presumed intention of the parties, *necessarily* implied from the language of the parties to carry out the purposes of the contract.

It should be reiterated that respondent did not argue that the language in question was broad enough to grant all television rights. That question was not before the Trial Court or Court of Appeals and is not present before this Court. The only question is whether respondent rightfully licensed its motion picture "MAYTIME" for television exhibition. Petitioner painfully ignores the import of the "reservation" clause (Paragraph 13, Exhibit B; 27a) wherein it specifically stated that "nothing herein contained shall in any way limit or restrict the rights which Purchaser has acquired or shall hereafter acquire from any other person, firm, or corporation in and to 'Wie Einst Im Mai' and/or 'Maytime' ".

From the above quoted language it is clear that petitioner reserved nothing which could interfere with respondent's absolute right to exhibit its motion picture in any form, fashion or medium.

In this connection the rule of construction which states that in case of doubts grants are to be construed in favor of the grantee should certainly prevail.

Although the specific word "television" does not appear in either the granting or reservation clauses, the granting-language as generally understood in 1930 was certainly broad enough to secure this right of motion picture exhibition to respondent. Conversely, the reservation not only did not specifically retain television exhibition rights, but more importantly, it had a proviso which nullified any right that might have been retained that interfered with or in any way limited or restricted *any rights* Warner obtained or would obtain in "MAYTIME" *from any other person.*

The testimony and evidence in this case was inconclusive as to which party prepared the May 12, 1930 grant, but it is reasonable to assume that "the crucial language" was inserted by Hans Bartsch in that it was the same as that used in the grant of the same rights to him earlier that year (Exhibit A; 17a-19a). The use of identical language in granting rights as was used in acquiring them is a common method of insuring the grant of all the rights then held by the grantor.

This indicates that the crucial language was inserted by Hans Bartsch and should be construed against the petitioner.

There can be no doubt that Hans Bartsch, petitioner's predecessor, was the grantor of certain rights by means of the 1930 Bartsch/Warner agreement. It is basic law that such documents are construed in favor of the grantee (Warner-MGM) and against the grantor (Bartsch). It is also the "preferable" view that the grantee should be allowed to "properly pursue any uses which may *reasonably* be said to fall within the medium as described in the license." (Nimmer, *Copyright*, § 125.3, italics added.) (40a-41a).

C. The exhibition of a motion picture by television is by a process analogous to cinematography.

The Court of Appeals did not reject the holding of the Trial Court to the effect that "the exhibitions of the film on television qualify as reproductions of the play 'by the art of cinematography or any process analogous thereto'" (10a). The Court of Appeals obviously found it unnecessary to rule on this point in its holding that respondent had obtained sufficient rights to license for broadcast or exhibit the copyrighted motion picture by television.

While respondent contends that the Trial Court's holding on this point was correct, it does not believe that it is necessary to further argue this point since the holding of the Court of Appeals is completely sufficient to suppport respondent's position.

III. The holdings below do not result in any conflict of decisions.

As is self-evident in the opinions below, the holdings of the Trial Court and the Court of Appeals are solely on the facts of contractual intention and meaning. Aside from the import of the "clearly erroneous" standard of Rule 52a, *supra*, and the "two court" doctrine, the holdings below do not conflict with any holding of this Court or of any other Court of Appeals. For this reason alone, the Petition for Certiorari should be denied.

The only two cases relied upon by petitioner (15, 16) are each inapposite to the issue before this Court. The first of these is *Ettore* v. *Philco Television Broadcasting Corp.*, 229 F. 2d 481 (3rd Cir. 1956), cert. den., 315 U. S. 926 (1956). Of major importance there were several factors not present in the instant case, to say nothing of the fact that *Ettore* was decided primarily on a right of privacy theory. From the opinion it appears that the

grant to Philco was of "motion picture rights" only, with no mention of exhibition by analogous processes. Also, in *Ettore,* the Court was careful to point out that none of the parties to the contract (made in 1936 and not before the Court) were aware of commercial television (it did not in fact exist until 1941), and it was thus reluctant to construe the grant as including a right not known to the parties (38a). Clearly this is not the situation in the instant case where not only were the parties aware of television and its commercial potential, but the producers actually sought to and did use language conveying such exhibition rights, occasionally, *in haec verba.*

With respect to *Warner Bros. Pictures, Inc.* v. *Columbia Broadcasting System, Inc., supra,* the real meaning of this decision supports respondent's over-all copyright position. Respondent fails to see *any* analogy in support of petitioner's position between the instant case and the case where the creator of the detective "Sam Spade" assigned to a motion picture producer dramatization rights to a work entitled "The Maltese Falcon" in which the character "Sam Spade" had appeared and subsequently assigned to Columbia Broadcasting System, Inc. the right to use the character "Sam Spade" on radio programs. In the "Sam Spade" case, the Court held *inter alia* that because of the prevailing custom in the field of detective fiction of reusing the central character in new plot situations, the original assignment could not have been intended to give the plaintiff exclusive dramatization rights and therefore, the creator was free to assign the right to use the character in radio broadcasts. This is indeed a far cry from the facts of this litigation. This case relied upon by petitioner involved only the rights to a character in a story, there being no question but that motion picture rights to "The Maltese Falcon", including the use of "Sam Spade" therein, and including the absolute right to exhibit "The Maltese Falcon" by means of any medium in-

cluding television, were granted. As previously noted, the case supports respondent's position and the danger involved in "over-drafting", i.e., the rule *expressio unius est exclusio alterius.* Id. at 949.

It is interesting to note that this Court denied certiorari in the "Sam Spade" case where both the Trial Court and the Court of Appeals interpreted a contract as precluding petitioner's right to recover. Certiorari was also denied in the *Ettore* case, *supra.*

CONCLUSION

The Court should deny the Writ of Certiorari.

Respectfully submitted,

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